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In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM MCNEIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 28 U.S.C. 2675(a), which provides that "[a]n action shall not be instituted upon a claim against the United States" under the Federal Tort Claims Act "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing," requires a district court to dismiss a complaint filed prior to the agency's denial of the plaintiff's administrative claim, or whether the court has discretion to exercise jurisdiction over the action if the agency denies the claim prior to substantial proceedings on the merits.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 26-31) is reported at 964 F.2d 647. The opinion of the district court (J.A. 18-24) is unreported.

JURISDICTION

The judgment of the court of appeals (J.A. 32) was entered on May 20, 1992. A petition for rehearing was denied on June 26, 1992. J.A. 31. The petition for a writ of certiorari was filed on September 21, 1992, and was granted on January 15, 1993. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2401, 2671-2680, are reprinted in the Appendix to this brief.

STATEMENT

1. a. Petitioner is incarcerated in an Illinois state prison. On March 6, 1989, he filed a *pro se* complaint in the United States District Court for the Northern District of Illinois seeking $20 million in damages against the United States Public Health Service (USPHS) under the Federal Tort Claims Act. J.A. 3-7. Petitioner claimed that he and other inmates had been compelled to participate in experiments conducted or financed by the USPHS for the purpose of studying the spread of infectious diseases. J.A. 3-4. The complaint alleged that petitioner was forced to share a cell with a prisoner who had AIDS, and that the medical experiments had impaired his life in other unspecified respects. J.A. 7.

Petitioner did not present an administrative claim to the agency prior to filing suit in the district court.[1]

[1] Petitioner had previously written a letter to the USPHS seeking information about public health experiments conducted on inmates and requesting damages. On January 24, 1989, the FDA advised petitioner that his letter was being referred to the USPHS claims officer and would be treated as an administrative claim. J.A. 17. Instead, petitioner's inquiry was treated as a Freedom of Information Act request, and he was advised by letter of February 9, 1989, that no responsive documents had been found. J.A. 8-9. Petitioner did not argue in the court of appeals, or in this Court, that his letter to the USPHS should have been treated as an administrative claim, or that the agency's responsive letters constituted a final written denial of that claim.

Instead, on July 7, 1989, approximately four months after the complaint was filed, petitioner submitted a claim to the Department of Health and Human Services (HHS) seeking $500,000 in damages. HHS denied that claim on July 21, 1989. J.A. 12-13. On August 7, 1989, petitioner sent a letter to the district court informing the court that his claim had been denied by the USPHS, and requesting the court to "commence his legal action." J.A. 10.

b. The United States was not served with petitioner's complaint until July 30, 1990, almost 18 months after the complaint was filed, and one year after the administrative claim had been denied. J.A. 2. This delay occurred because petitioner sought leave to proceed *in forma pauperis*, but his motion was not finally acted on by the court until April 20, 1990 (five days after he had voluntarily paid the filing fee). J.A. 1, 20. By order of April 20, 1990, the court denied the motion for leave to proceed *in forma pauperis* as moot, but directed the United States Marshal to serve the complaint because petitioner was incarcerated. J.A. 1. The United States filed an answer on August 29, 1990. J.A. 2. At that time, the United States was unaware that petitioner's complaint had been filed almost a year and a half earlier.

On September 19, 1990, the United States moved to dismiss the complaint. J.A. 2. The motion contended that petitioner's action was barred by the statute of limitations, 28 U.S.C. 2401, because the complaint was not filed until May 25, 1990 (the date the clerk issued the summons), more than six months after his claim had been denied by the agency. J.A. 20. Petitioner opposed the motion to dismiss on the ground that the complaint had been filed with the

clerk on March 6, 1989, prior to the expiration of the six-month period of limitations. *Ibid.* In its reply, the government contended that the action would have to be dismissed under 28 U.S.C. 2675(a) even if petitioner's complaint was filed on March 6, 1989, because that provision prohibits a claimant from instituting an action prior to seeking administrative relief. *Ibid.*

c. The district court dismissed the action. J.A. 18-24. The court first determined that the action was commenced on March 6, 1989, the date petitioner lodged his complaint with the district court and requested waiver of the filing fee. J.A. 20-21. Based upon that determination, the court concluded that it had to dismiss the action because petitioner had not complied with the jurisdictional prerequisites established by Section 2675(a). J.A. 21-24. The court found that petitioner filed the action prior to submitting a claim to the agency (J.A. 23-24), in direct contravention of the statutory requirement that "[a]n action shall not be instituted * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." 28 U.S.C. 2675(a).

The court rejected the argument that it had discretion to exercise jurisdiction over the case because petitioner had "exhausted his administrative remedies by the time the government filed its motion to dismiss." J.A. 21, 23. Even though the court assumed that dismissal of the complaint would leave petitioner "without any means to pursue his claim against the government" (J.A. 23-24) because more than six months had passed since the denial of his administrative claim, the court found that it had no

authority to "overlook the effect of his premature filing." J.A. 24.[2]

2. a. The court of appeals affirmed. J.A. 26-31. The court concluded that under the terms of 28 U.S.C. 2401(b) and 2675(a), petitioner was required to file his FTCA action between July 21, 1989, and January 21, 1990—the six-month period following the final administrative denial of his claim. J.A. 27. Petitioner did not satisfy this requirement, because the March 1989 complaint was filed "too early," and petitioner did not file a "fresh suit" after July 21, 1989. J.A. 29.

The court of appeals rejected the argument that petitioner's August 1989 letter supplied a basis for jurisdiction. J.A. 29-30. That letter notified the district court that the agency had denied petitioner's administrative claim, and requested the court to "commence his legal action." J.A. 10. The court found, however, that only a new complaint could satisfy the requirement of Section 2675(a). J.A. 29. Because petitioner "did not characterize the letter as a complaint in the district court (where he represented himself) or here (where a professor of the Loyola School of Law is serving as his counsel)," the court found that "it was not plain error" to "treat [the letter] as what it purported to be—a request to

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[2] Section 2401(b) states that a tort action against the United States must be "begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented." Petitioner therefore had six months from July 21, 1989, the date that USPHS denied his administrative claim, within which to file an FTCA action. Petitioner has not filed any action other than the one filed on March 6, 1989.

get on with a pending case, rather than a new complaint." J.A. 30.

b. In reaching its decision, the court declined to follow the rule established in two other circuits that when "the administrative claim is denied before any substantial progress has been made in the pending litigation, the suit need not be refiled to be effective." J.A. 27 (quoting *Kubrick* v. *United States*, 581 F.2d 1092, 1098 (3d Cir. 1978), rev'd on other grounds, 444 U.S. 111 (1979), and citing *Celestine* v. *Veterans Admin. Hosp.*, 746 F.2d 1360, 1363 (8th Cir. 1984)). The court found that neither of those decisions "discussed the language of § 2675(a)" or "explain[ed] why the statute Congress actually enacted may be disregarded." J.A. 28. The court instead agreed with the Fifth Circuit's decision in *Reynolds* v. *United States*, 748 F.2d 291, 292 (1984), which the district court had relied upon in support of its dismissal of petitioner's action. J.A. 27-29. See also *Jerves* v. *United States*, 966 F.2d 517 (9th Cir. 1992) (construing Section 2675(a) as barring an action filed before the plaintiff filed an administrative claim and received a final denial).

The court of appeals drew support for its reading of Section 2675(a) from this Court's decision in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989). In that case, the Court interpreted a section of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6972(b)(1), which required parties to give state and federal authorities 60 days' notice prior to commencing an action under the Act. In *Hallstrom*, the Court rejected the argument that this requirement could be satisfied by filing the action before giving the agencies 60 days' notice as long as the action was stayed for 60 days thereafter. 493

U.S. at 26. In this case, the court of appeals compared the FTCA to the RCRA, and determined that "Section 2675(a) is no less insistent that '[a]n action shall not be *instituted*' before the administrative action" (J.A. 28); that *Hallstrom*'s observation that "negotiation may be more effective if there is not already a lawsuit on file" is "no less true of the FTCA than of the RCRA" (J.A. 29); and that Section 2675(a), which represents a "condition on access to the Treasury" is a more appropriate candidate for "literal interpretation" than "fetters on litigation against persons despoiling the environment." J.A. 29. The court of appeals accordingly concluded that "*Hallstrom* ordains the interpretation of § 2675(a)." *Ibid.*

c. Judge Ripple dissented. J.A. 30-31. He found that it was unnecessary to define the scope of the district court's discretion under Section 2675(a). In his view, petitioner's August 7, 1989, letter "serves as an adequate complaint" and constituted an "attempt[] to refile the action." J.A. 31.[3]

[3] The petition filed in this action did not seek review of the question decided by Judge Ripple. See Pet. at Question Presented ("Whether an incomplete filing" in an FTCA action "may be perfected by filing a notice of final agency denial of the claim prior to substantial progress on the merits?"). Petitioner's brief adds a second question, however. Pet. Br. i. That question purports to include the issue of whether the action is barred if the plaintiff requests the court to "commence his legal action" when he files proof of the agency's denial of the claim. *Ibid.* Although we share the court of appeals' view that petitioner did not preserve the argument that his letter could be characterized as a supplemental pleading, J.A. 30, we do not object to consideration of this issue. For the reasons set forth at note 4, *infra*, we do not think the language of petitioner's letter alters the outcome in this case.

SUMMARY OF ARGUMENT

Petitioner filed an FTCA action against the United States without first complying with an administrative claim procedure established by Congress. Section 2675(a) of the FTCA mandates that a tort action "shall not be instituted" against the United States unless two prerequisites have been satisfied: "the claimant shall have *first* presented the claim" to the agency, and the claim "shall have been finally denied by the agency in writing." 28 U.S.C. 2675(a) (emphasis added). Petitioner had satisfied neither condition at the time he filed his complaint. Petitioner contends that dismissal of his complaint was not required because he cured the jurisdictional defect by exhausting the statutory claim procedure several months after the claim was filed. The lower courts correctly determined that the language of the FTCA precludes courts from creating implied exceptions to the unambiguous requirements of Section 2675(a), and that any such interpretation would also be foreclosed by this Court's decision in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989).

A. Section 2675 obviously does not confer express authority on federal courts to excuse literal compliance with its terms. Nor can that authority be implied. First, Section 2675 is written as a mandatory prohibition on filing suit unless the plaintiff "first" presents the claim to the agency. Second, Congress created certain limited exceptions to the bar established by Section 2675(a), but those exceptions do not make any allowance for litigants who exhaust the claim procedure after filing the action. Third, 28 U.S.C. 2679(d)(5) demonstrates that Congress presumed that actions filed against federal officials

would have to be dismissed for nonconformance with the terms of Section 2675(a) if the United States is later substituted as the defendant under the Westfall Act. To alleviate the unfairness of that result, Congress modified the statute of limitations, but did not create an exception to Section 2675 so as to permit exhaustion while the civil action remained pending. Finally, the grant of jurisdiction to entertain tort actions against the United States is expressly made "subject to the provisions of [the FTCA]," 28 U.S.C. 1346(b), and jurisdictional requirements must be strictly observed.

B. The court of appeals also correctly determined that this Court's decision in *Hallstrom* "ordains [this] interpretation of Section 2675(a)." J.A. 29. In *Hallstrom*, the Court concluded that it had no discretion to affirm a judgment entered after four years of litigation and a trial on the merits. The Court ordered dismissal of the action because the plaintiffs filed their complaint without giving state and federal agencies 60 days' advance notice as required by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6972(b)(1).

This Court determined that when Congress provided that "no action may be commenced" prior to giving notice, federal courts are "not at liberty to create an exception." 493 U.S. at 27. Even though a 60-day stay of the action may have served as the "functional equivalent" of the statutory requirement, the Court concluded that it would not "honor" the statutory prohibition against filing the action in the first place. *Id.* at 26. Here, petitioner did not "honor" the requirements of Section 2675 when he filed his action first and his administrative claim later.

ARGUMENT

PETITIONER FAILED TO MEET THE PREREQUISITES FOR SUIT SET FORTH IN SECTION 2675(a), AND THE DISTRICT COURT WAS THEREFORE REQUIRED TO DISMISS HIS COMPLAINT

Congress vested district courts with jurisdiction over tort actions against the United States pursuant to 28 U.S.C. 1346(b), but expressly provided that this grant of jurisdiction was "[s]ubject to the provisions of chapter 171 of [the FTCA]." *Ibid.* One of those provisions, 28 U.S.C. 2675(a), explicitly prohibits the institution of a tort action against the United States "unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing." There is no dispute that petitioner had not complied with this requirement when he filed his action in March of 1989. Petitioner nevertheless contends that Congress did not require dismissal of all actions that failed to meet the prerequisites of Section 2675(a), but instead gave district courts discretion to proceed with such an action once the agency denied the administrative claim. The court of appeals correctly determined that petitioner's claim is foreclosed by the language of the FTCA and this Court's decision in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989). Dismissal of the action was required.

A. The Language Of The FTCA Establishes That A District Court Does Not Have Discretion To Exercise Jurisdiction Over An FTCA Action Filed Prior To The Plaintiff's Submission Of An Administrative Claim

In cases that turn on statutory construction, "the beginning point [for analysis] must be the language

of the statute," and when a statute's language is plain, "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). Here, the express terms of Section 2675(a), the language of Section 2679, and the canons of construction that govern the interpretation of the FTCA, establish that the district court did not have discretion to proceed with this civil action.

1. As the court of appeals found, Section 2675(a) is written as an express *prohibition* on suit. J.A. 28. It commands that "an action shall not be instituted" unless its prerequisites are met. 28 U.S.C. 2675(a). Where Congress has expressly forbidden the institution of an action unless certain conditions are met, there is no basis for concluding that a district court has implied discretion to entertain such an action anyway. *Hallstrom*, 493 U.S. at 26, 31.

In addition, Congress created certain limited exceptions to the bar established by Section 2675(a), and those exceptions do not make any allowance for the circumstances of this case. The last sentence of Section 2675(a) states that "[t]he provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." All of the pleadings referenced are defensive in character, suggesting that Congress did not seek to impose the mandatory exhaustion requirement on litigants who have not initiated the action in the first instance.

Congress made no exception, however, for a plaintiff who might seek to amend or supplement his complaint in some fashion to assert compliance with

the exhaustion requirements after initiation of the action. Any such "exception" would obviously vitiate the rule that the claimant must "first" submit the administrative claim.[4] Congress enacted Section 2675 to give federal agencies an opportunity to settle each claim *prior* to the filing of litigation. If petitioner's rule were to prevail, plaintiffs could completely ignore that statutory requirement.

2. This interpretation of Section 2675(a) is further confirmed by the text of 28 U.S.C. 2679. Section 2679 governs tort actions filed against federal officials. The statute provides that the United States must be substituted as the defendant in such actions if the Attorney General, or the court, certifies that the defendant/employee committed the allegedly tortious acts within the scope of his employment. 28 U.S.C. 2679(d)(1) and (3). Section 2679(d)(5) was enacted, however, on the premise that Section 2675(a) requires dismissal of such actions where the plaintiff has not submitted an administrative claim to the agency prior to filing suit. Congress itself has therefore determined that courts do not have equita-

[4] For this reason, we do not believe that petitioner could prevail even if his August 1989 letter were characterized as an amended or supplemental pleading under Fed. R. Civ. P. 15. See Pet. Br. 47-48. Rule 15 permits supplemental pleadings in an ongoing civil action. Section 2675, however, prohibits institution of that very "action," so the jurisdictional defect cannot be cured by filing additional pleadings in the forbidden suit. As the court of appeals concluded, only a new civil action can satisfy the command of Section 2675. J.A. 29. Even now, petitioner does not contend that his letter can be characterized as the initiation of a new civil action. See Pet. Br. 47-48. As the court of appeals noted, the letter only purported to be "a request to get on with a pending case." J.A. 30.

ble discretion to modify the requirements of Section 2675(a), even where the plaintiff did not voluntarily file the action against the United States.

Once the United States is substituted as the defendant under Section 2679, the action "shall be subject to the limitations and exceptions" applicable to all FTCA actions. 28 U.S.C. 2679(d)(4). Congress further provided that when such an action is then "*dismissed* for failure first to present a claim pursuant to section 2675(a) of this title," the statute of limitations set forth in Section 2401(b) is modified so that the claim can be presented to the agency "within 60 days after *dismissal* of the civil action." 28 U.S.C. 2679(d)(5)[5] (emphasis added). It is significant that Congress did not provide that such plaintiffs could comply with the exhaustion requirements of Section 2675 during the pendency of the action, even though their failure to submit a prior administrative claim might readily be explained by the fact that they were not asserting a claim against the United States at the time they filed the action. Congress instead accommodated their circumstances by extending the statute of limitations for filing a new action, not by excusing or modifying the prerequisites established by Section 2675(a). It would therefore be particularly inappropriate to conclude that a plaintiff who files an action against the United States in the first instance can nevertheless avoid dismissal under Section 2675 by exhausting his administrative claim during the pendency of the civil action.

[5] Under the terms of 28 U.S.C. 2401(b), the claimant would then have six months from the date of "final denial of the claim by the agency" to file a new civil action on the claim.

3. Contrary to the contention of petitioner and his *amicus*, the construction we urge is neither unduly strict nor "hypertechnical." See Pet. Br. 27; Trial Lawyers For Public Justice *Amicus* Br. 3-4. Rather, the interpretation we urge is the one required by the statute's language. And that interpretation is further confirmed by the governing principles of statutory construction.

a. As the court of appeals found, Section 2675(a) is a "prime candidate for literal interpretation" because it is a "condition on access to the Treasury." J.A. 29.[6] This Court has repeatedly recognized that the FTCA "waives the immunity of the United States," and in light of that fact, has emphasized that it is not free "to extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). See *Smith* v. *United States*, No. 91-1538 (Mar. 8, 1993), slip op. 6-7; *Dalehite* v. *United States*, 346 U.S. 15, 31 (1953) (this Court's "decisions have interpreted the Act to require clear relinquishment of sovereign immunity to give jurisdiction for tort actions"). See also

[6] Petitioner notes (Pet. Br. 32-37) that Section 2675 was modeled on the notice requirements of state statutes governing suits against municipalities; and that, because those notice provisions were enacted in derogation of the common law, they have been strictly construed against municipalties. That rule of construction would surely not be applicable to Section 2675, however. As a general matter, the common law background applicable in this context is that the United States was altogether immune from suit. See *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Further, Congress did not simply codify municipal notice requirements into federal law. This Court must obviously construe the language actually chosen by Congress, and give that language effect.

United States v. *Sherwood*, 312 U.S. 584, 586 (1941).[7]

b. In addition, the requirements of Section 2675(a) represent conditions on the jurisdiction of the federal courts.[8] See 28 U.S.C. 1346(b) (creating jurisdiction "[s]ubject to the provisions of [the FTCA]"). Many lower courts have concluded that "[t]he requirements [of Section 2675] are jurisdictional and cannot be waived." *Cizek* v. *United States*, 953 F.2d 1232, 1233 (10th Cir. 1992). Accord, *e.g.*, *Corte-Real* v. *United States*, 949 F.2d 484, 485-486 (1st Cir. 1991); *Meridian Int'l Logistics, Inc.* v. *United States*, 939 F.2d 740, 743 (9th Cir. 1991); *Adkins* v. *United States*, 896 F.2d 1324, 1326 (11th Cir. 1990); *McAfee* v. *5th Circuit Judges*, 884 F.2d 221, 222-223 (5th Cir. 1989); *Bradley* v. *United*

[7] This is not a case in which an *exception* to the FTCA's waiver of immunity is at issue; to the contrary, Section 2675 sets express *conditions* on the waiver. It would therefore be inappropriate to apply the principle that exceptions to the FTCA's waiver of immunity must be "narrowly construed," as this Court has sometimes done. See *United States* v. *Nordic Village, Inc.*, 112 S. Ct. 1011, 1014 (1992) (citing *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 547 (1951)). See also *Smith* v. *United States*, No. 91-1538 (Mar. 8, 1993), slip op. 6 (Stevens, J., dissenting).

[8] Because the "general rule" is that "if an action is barred by the terms of a statute, it must be dismissed," *Hallstrom*, 493 U.S. at 31, this Court need not reach the question whether Section 2675(a)'s requirements are jurisdictional in order to resolve this case. If the Court agrees that the language of the statute is plain, it follows that "a district court may not disregard [its] requirements at its discretion." *Ibid.* Accordingly, just as the Court concluded in *Hallstrom*, dismissal would be required even if Section 2675(a) were not "jurisdictional in the strict sense of the term." *Ibid.*

States, 856 F.2d 575, 578 (3d Cir. 1988); *Knapp* v. *United States*, 844 F.2d 376, 378 (6th Cir. 1988). And the provisions of Section 2675 were recently described as "jurisdictional" in the legislative history of the Westfall Act amendments to the FTCA. H.R. Rep. No. 700, 100th Cong., 2d Sess. 8 n.3 (1988).

Given the jurisdictional character of Section 2675, it would be particularly inappropriate to permit federal courts to recognize implied exceptions to the literal terms of that Section.[9] This Court should accordingly conclude that the specific language of the FTCA requires dismissal of any action filed in violation of the jurisdictional conditions established by Section 2675, without regard to the plaintiff's subsequent efforts to present an administrative claim to the agency.[10]

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[9] This Court's decision in *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), does not point to a different conclusion. The Court determined in *Irwin* that the statute of limitations applicable to suits against the United States under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, was subject to equitable tolling. This Court has not determined whether tolling is available under the FTCA statute of limitations, 28 U.S.C. 2401, but *Irwin* has no bearing on the proper interpretation of Section 2675 in any event. Section 2675 does not establish periods of limitation—it establishes mandatory exhaustion prerequisites. The Court noted in *Irwin* that statutes of limitations are generally subject to equitable tolling, but outside that context, this Court has steadfastly adhered to "the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarge[d] * * * beyond what the language requires." *United States* v. *Nordic Village, Inc.*, 112 S. Ct. at 1014-1015 (internal quotations and citations omitted).

[10] This Court has allowed a plaintiff to cure a jurisdictional defect where the language of the governing statute permitted

B. *Hallstrom* v. *Tillamook County* Controls This Case

1. As the court of appeals found, this Court's decision in *Hallstrom* v. *Tillamook County*, 493 U.S. 20 (1989), is analytically indistinguishable from this case. *Hallstrom* involved the interpretation of a notice requirement in the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6972(b)(1). That statute provided that "[n]o action may be commenced * * * prior to 60 days after the plaintiff has given notice of the violation" to state and federal authorities. The plaintiffs in *Hallstrom* filed suit in the district court before notifying the appropriate administrative agencies in accordance with the requirements of the statute. Notice was subsequently given, and the action was stayed for 60 days. After nearly four years of litigation, including a trial on the merits and a liability finding in favor of the plaintiffs, the case reached this Court.

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that result. In *Mathews* v. *Diaz*, 426 U.S. 67, 75 (1976), a plaintiff sought to challenge the agency's policy of denying Social Security benefits to a certain class of aliens. The plaintiff did not file an application for those benefits until after the action was filed, but the Court concluded that jurisdiction was proper because the complaint could have been supplemented to allege the fact that the agency had issued a final decision on the application. *Id.* at 75 & n.9. The statute at issue in *Diaz*, 42 U.S.C. 405(g), however, provides only that an individual "may obtain" review of a "final decision of the Secretary." That section does not contain any language similar to that of Section 2675 *prohibiting* a claimant from filing a civil action prior to the agency's denial of an administrative claim. By way of contrast, this Court squarely rejected the contention that RCRA's 60-day notice provisions could be satisfied during the pendency of the action because the language of the Act *prohibited* such action. *Hallstrom*, 493 U.S. at 26.

This Court held that the notice provision was "a specific limitation on a citizen's right to bring suit" and that it set a "mandatory * * * condition precedent for suit." 493 U.S. at 26. The plaintiffs' failure to issue the required notices prior to filing suit mandated dismissal of the complaint. The Court rejected policy arguments similar to those petitioner makes here: that the plain terms of the statute should not be enforced so long as the substance of the notice requirement was met, see *id.* at 28; and that it would be wasteful and inefficient to require dismissal of the action. See *id.* at 32. The Court declared that "we are not at liberty to create an exception where Congress has declined to do so," *id.* at 27, even in a case where litigation "consumed the time and energy of a District Court and the parties for nearly four years." *Id.* at 32.

Petitioner suggests three bases for distinction between *Hallstrom* and this case: the language of the two statutes; the purposes underlying the statutory schemes; and the nature of the prejudice that would result if equitable exceptions are not recognized. An examination of these issues, however, simply confirms the correctness of the court of appeals' conclusion that *Hallstrom* "ordains" our interpretation of Section 2675(a). J.A. 29.

2. Petitioner argues (Br. 41-43) that the result in *Hallstrom* should not govern here because the FTCA provides that an action "shall not be instituted" prior to filing an administrative claim, whereas RCRA provides that an action "may [not] be commenced" until the required notice is given. Petitioner argues that the word "institute" may include activities before or after an event "commences." Thus, petitioner argues that although his action

"commenced" on March 6, 1989, it was not "instituted" until his administrative claim was denied five months later.

Petitioner's effort is unavailing. The terms "institute" and "commence" are synonymous. The dictionary defines "institute" as "to originate and get established" or to "cause to come into existence," and offers as synonyms "inaugurate" or "initiate." *Webster's Third New International Dictionary* 1171 (1986). Giving the term its ordinary meaning, there can be no doubt that petitioner's action was "originated," and "came into existence"—that is, it was instituted—when he filed his complaint. See *Smith-Bey* v. *Hospital Adm'r*, 841 F.2d 751, 757 n.5 (7th Cir. 1988) (complaint is deemed filed when it is "placed in the custody of the district court clerk"). Moreover, Congress has frequently used the words "institute" and "commence" interchangeably in referring to the initiation of a civil suit. See, *e.g.*, 16 U.S.C. 544m(b); 7 U.S.C. 2305(a); 12 U.S.C. 1977; 25 U.S.C. 640d-17(c); 19 U.S.C. 1641(d)(4); 42 U.S.C. 2651(b); 19 U.S.C. 1621; 29 U.S.C. 256; 42 U.S.C. 2000a-3(a).

3. a. The purposes underlying the prerequisites for suit under the RCRA and the FTCA are also closely analogous. This Court suggested in *Hallstrom* that Congress may have determined that negotiation would be more effective if plaintiffs were to notify agencies of potential claims before filing environmental lawsuits. 493 U.S. at 29-30. As the court of appeals noted, "that observation is no less true of the FTCA than of the RCRA." J.A. 29.

Congress did not understand the administrative claim requirement in the FTCA to be without sub-

stance or utility.[11] On the contrary, Section 2675(a) represents the balance Congress struck between permitting tort recovery against the United States and preventing excessive numbers of such suits in federal courts. Congress thus required federal agencies to be given the opportunity to settle meritorious claims, with the expectation that doing so would "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the

[11] As part of the deliberations leading to the enactment of Section 2675, Congress was presented with testimony that claimants regularly bypassed the agencies when the administrative settlement process was optional, as it was with respect to the FTCA. *Hearing on Improvement of Procedures in Claims Settlement and Government Litigation Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 12-14 (1966) (statement of Ass't Att'y Gen. John W. Douglas). In response, Congress enacted Section 2675 to make the administrative filing requirement compulsory, and also removed caps on agency settlement authority. Act of July 18, 1966, Pub. L. No. 89-506, §§ 1(a), 9(a), 80 Stat. 306, 308. Congress expected that making an administrative claim a prerequisite to suit "would not only benefit private litigants, but would also be beneficial to the courts, the agencies, and the Department of Justice itself." S. Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966). See also *Douglas* v. *United States*, 658 F.2d 445, 447 (6th Cir. 1981) ("[t]he compulsory administrative claim procedure in the amended FTCA was established to reduce congestion of federal courts' dockets and to speed fair treatment of those asserting claims against the federal government"). Moreover, it was important to present the claim initially to the concerned agency, because that agency "would have the best information concerning the [event and] is the one directly concerned, it can [therefore] be expected that claims which are found to be meritorious can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation." S. Rep. No. 1327, *supra*, at 3.

fair settlement of tort claims asserted against the United States." S. Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966).

Requiring presentment of a claim to the agency *prior* to filing suit serves an additional function as well. Just as was the case in *Hallstrom*, Congress concluded that it was important to permit settlement negotiations to proceed without the backdrop of pending litigation. Moreover, claimants are required to disclose the amount of damages they are seeking, and the statute bars any cause of action "for any sum in excess of the amount of the claim presented to the federal agency." 28 U.S.C. 2675(b).[12] Thus, the federal agency is put on notice of the amount of money that is at stake, and if it chooses not to settle, it is shielded from liability for an amount in excess of the plaintiff's administrative claim.[13]

b. Petitioner nevertheless invokes legislative history to support his contention that the FTCA, unlike the RCRA, should be construed to effectuate its goal of compensating persons injured by reason of the government's tortious acts. See Pet. Br. 10-32. The history of Section 2675(a), however, indicates that Congress did not expect courts to disregard statutory prerequisites to suit. As set forth, Congress in fact recently characterized the requirements of Section

[12] The statute permits, however, claims in excess of the amount sought administratively if "the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency." 28 U.S.C. 2675(b).

[13] We note that in this case petitioner's complaint sought $20 million in damages, while his later-filed administrative claim only sought $500,000.

2675(a) as "jurisdictional." H.R. Rep. No. 700, 100th Cong., 2d Sess. 8 n.3 (1988).

The history of the FTCA demonstrates that Congress initially did not consider it necessary to require plaintiffs to seek administrative relief at any time, either before or after filing suit in district court.[14] Dissatisfied with that regime, Congress enacted Section 2675(a), which by its clear terms *requires* the presentment of an administrative claim *prior* to filing suit. In view of the congressional rejection of its former rule permitting administrative claims to be made (and withdrawn) at the plaintiff's option, it would be particularly inappropriate to disregard Section 2675(a)'s absolute requirement that an administrative claim be presented prior to filing suit.

c. Petitioner further argues that the purposes of the FTCA are satisfied if an administrative claim is filed and denied at some point prior to dismissal of the action. But the same argument was rejected in *Hallstrom*. This Court found that even if the entry of a 60-day stay in a RCRA action were the "functional equivalent" of a pre-filing notice requirement, the entry of a stay simply did not "honor" the statutory "prohibition" against filing suit. 493 U.S. at

[14] From 1946, when the FTCA was first enacted, until 1966, plaintiffs had the option of filing an administrative claim before filing an action in federal court. There was no requirement that they do so. Further, if a person chose to file an administrative claim, he was entitled, on 15 days' notice, to withdraw his claim from agency consideration and institute suit. See Federal Tort Claims Act of 1946, ch. 753, § 410, 60 Stat. 843. Even where claims were filed, agency settlement authorization was limited to claims not exceeding $1000, § 403(a), 60 Stat. 843, an amount raised to $2500 in 1959. Act of Sept. 8, 1959, Pub. L. No. 86-238, 73 Stat. 472 (codified at 28 U.S.C. 2672).

26. Similarly, even if petitioner's notice to the court that the agency had denied the claim (whether that notice took the form of a letter or an amended complaint) could be characterized as the "functional equivalent" of a new action, such a notice does not "honor" the statutory prohibition against filing the action in the first place. *Ibid.*

4. a. There is also no basis for distinguishing *Hallstrom* on equitable grounds. Petitioner relies (Pet. Br. 40) on this Court's statement in *Hallstrom* that dismissal of the RCRA action would not deprive the plaintiffs of their "right to a day in court" because they would "remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." 493 U.S. at 32. In contrast, petitioner claims that he "is long out of time to refile his case" because his complaint was "lost in the mass of prisoner litigation." Pet. Br. 40 (quoting J.A. 20). Although it may be true that the plaintiffs in *Hallstrom* could refile their action because they were challenging continuing environmental violations, and that petitioner's action may now be barred by the FTCA's statute of limitations, that difference is not germane to the issue of statutory interpretation before the Court.

First, there was no dispute that dismissal of the action in *Hallstrom* substantially prejudiced the plaintiffs. The parties had prevailed at trial after almost four years of litigation. 493 U.S. at 32. Dismissal of the action required them to start anew. The Court did not, however, consider itself at liberty to affirm the judgment in the plaintiffs' favor because the notice provision represented a "specific limitation" on the "right to bring suit" that was not subject to a "flexible or pragmatic construction." *Id.* at 26. As

in *Hallstrom*, a district court hearing an FTCA action "may not disregard these requirements at its discretion." *Id.* at 31.

Second, the Court did not suggest that it would have interpreted the statute to grant such discretion if dismissal would have caused the plaintiffs to forfeit their "right to a day in court." 493 U.S. at 32. The Court cited this factor only in connection with the determination that its decision could properly be applied retroactively. *Ibid.* Other factors cited by the Court would similarly support retroactive application of the rule adopted by the court of appeals in this case.[15]

Third, petitioner is prejudiced only if his claim would now be barred by the statute of limitations. That issue has never been decided, however, because petitioner never sought to file a new civil action after his administrative claim was denied.[16] Petitioner has never argued that the FTCA's statute of limitations is subject to equitable tolling, or that the statute of

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[15] As the court of appeals noted (J.A. 30), the agency unequivocally informed petitioner when it denied his claim that he had six months in which to "file suit against the United States." J.A. 13. Petitioner did not file a complaint within that time period, and has not done so to this day. Moreover, as in *Hallstrom*, the statute itself put petitioner on notice of what was required. Petitioner has not, in any event, contended that this Court's decision should only apply prospectively.

[16] Although petitioner now suggests that his August 1989 letter could be treated as an amended or supplemental pleading in his 1988 action, Pet. Br. 47-48, he has never contended that he in fact intended to initiate a new civil action. As set forth, that is what the statute requires, because the "action" itself was barred. 28 U.S.C. 2675(a).

limitations set forth in 28 U.S.C. 2401 should be tolled under the circumstances of this case. But if petitioner is to be afforded any equitable relief, it is certainly more appropriate that it be granted under Section 2401 than under Section 2675. The unfairness that petitioner alleges does not stem from enforcement of the clear requirements of Section 2675, but from the fact that the district court did not dismiss his complaint until it was too late to file another action under Section 2401(b).

In any event, the structure of the statute indicates that exceptions to Section 2401's statute of limitations are quite limited. As set forth, Congress has modified the time limits established by Section 2401 to relieve certain plaintiffs from the consequences of a procedural default under Section 2675. But Congress has made no exceptions to the requirements of Section 2675, other than for parties asserting defensive tort claims. See 28 U.S.C. 2675(a) (excepting third party complaints, cross-claims, and counterclaims). Thus, as in *Hallstrom*, this Court should conclude that Section 2675 "contains no exception applicable to petitioners' situation" and federal courts "are not at liberty to create an exception where Congress has declined to do so." 493 U.S. at 27.

b. As with all procedural limitations, adherence to the terms of Section 2675(a) may sometimes make it "impossible to enforce what were otherwise perfectly valid claims." *United States* v. *Kubrick*, 444 U.S. at 125. The clear line drawn by Congress nonetheless ought to be maintained. As this Court has repeatedly stated, "[i]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Hallstrom*, 493

U.S. at 31 (quoting *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980)).[17]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[17] Petitioner and his *amicus* argue (Pet. Br. 49; Trial Lawyers for Public Justice *Amicus* Br. 14-15) that his *pro se* status in the district court justifies disregarding Section 2675's procedural requirements. This Court has previously rejected similar contentions. See *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147 (1984); *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980). Moreover, the principle that *pro se* pleadings are to be liberally construed does not help petitioner. No amount of liberal construction can change the fact that his complaint was filed at a time forbidden by Congress.

APPENDIX

The relevant provisions of the Federal Tort Claims Act, 28 U.S.C. 1346, 2401, 2671-2680, provide:

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph,

an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title [28 USCS §§ 2671 et seq.], the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in

the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954 [26 USCS §§ 6226, 6228(a), 7426, 7428, 7429].

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a [28 USCS § 2409a] to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

§ 2401. Time for commencing action against United States

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

§ 2671. Definitions

As used in this chapter [28 USCS §§ 2671 et seq.] and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the

United States, and corporations primarily acting as instrumentalties or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior

written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5 [5 USCS §§ 581 et seq.], to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and com-

promises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter [28 USCS §§2671 et seq.].

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively,

for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter [28 USCS §§ 2671 et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or lgislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter [28 USCS §§ 2671 et seq.]

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within

six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

§ 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346 (b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any

other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) (1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time

of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions

of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346 (b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§ 2680. Exceptions

The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) [Repealed]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso [enacted March 16, 1974], out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for co-operatives.

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